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May 24, 1996

Fritz Wagener, Chief
Water Quality Standards Section
U.S. Environmental Protection Agency
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Dear Mr. Wagener:

This letter is in response to your request for a review of the draft Region 4 antidegradation guidance for state/tribal implementation of Tier II procedures. Since Kentucky's antidegradation implementation methodology is now being reviewed by Region IV for approval, you can understand that our comments are driven by the experience this agency had in getting that regulation drafted, reviewed by interest groups, the public, and adopted by the state. We have several strong criticisms of the draft policy. Our comments follow the general headings of the draft document.

We also believe it is premature for the Region to proceed with prescriptive guidelines for Tier II procedures because the federal water quality standards are soon to be revised. The revisions may result in conflicts with your guidelines.

Page 1. Types of Activities Regulated under Antidegradation.

We support exempting <u>some</u> regulatory actions from Tier II requirements. However, exempting all general permits for instance, would seem to be against the intent of Tier II review, i.e. to only allow degradation if it is insignificant or can be justified by its importance to social and economic development in the area. Over 80% of Kentucky's KPDES permits are general permits and it would be easy for a third party to challenge their exemption from Tier II review. All permits (except stormwater) are required to be individual permits if they discharge to a Tier II water in Kentucky. By designating Tier II waters, instead of using a parameter by parameter approach, we know what waters will require these permits. That prevents a strain on agency resources and gives the regulated community surety on how a new or expanded discharge will be affected. One of the important considerations in our deliberations was to recognize that the regulated community needed to know where Tier II waters were and how they would be affected

if they had a facility discharge into them. The lack of clear criteria in regulations that define when Tier II reviews are to take place leads to charges of being arbitrary and inequitable. The statement that the intent of federal policy is not to require a Tier II decision in each and every instance that additional pollutants are added to surface waters of a state needs much more elaboration.

The regulatory inclusion of a rationale for the exemption of certain categories of activities from Tier II requirements may be contrary to state rule-making formats. Since our requirements are in the form of regulations, a rationale statement could not be included because of format restrictions. The rationale could be in the public record as either a part of our response to comments received at public hearings or could be in agency standard operating procedures manuals.

Page 2. Determination: Does the Proposed Degradation Require a State Decision under Tier II?

We suggest that you rewrite the second paragraph, third sentence to say that "otherwise, there is potential for a large number of waters not to receive **Tier II** antidegradation protection. The statement as written implies that Tier 1 waters do not receive antidegradation consideration, when in fact they do.

Kentucky investigated the use of water quality criteria to designate Tier II waters and found that to be too burdensome. A parameter by parameter approach to designate Tier II waters begs two questions that are not answered in the draft. Number one: How do you define "exceedance" levels for criteria? We defined that as the 85th percentile value of measurements taken monthly over a 2 year period (a minimum of 24 samples) not exceeding the chronic criteria concentration and no values being above the acute criteria concentration. Number two: What do you require if a potential discharge is to a stream that has not been monitored? When we suggested that a potential discharger should do the monitoring as prescribed above for criteria that would be in the effluent we received enough opposition to convince us that this approach would not pass legislative approval. It was also our experience that the regulated and environmental community believed that if the parameter by parameter approach was proposed that this would apply to streams of the state where any parameter was better than the criteria, essentially making all streams potential Tier II waters and subject to antidegradation review. The parameter by parameter approach dictates this. We cannot evision how it would work otherwise. The draft should address this issue with more clarity.

The draft policy states that antidegradation regulations should be applied to cases where significant lowering of water quality is projected to occur in order to focus limited state resources where they may result in the greatest environmental protection. This statement makes the definition of "significant lowering" very important. If as mentioned, a 10% or greater use of existing assimilative capacity is the definition, states will in fact be strained in resources because of the need for assessing assimilative capacity from monitored data and calculating whether the

10% threshold is reached by a proposed discharger. Kentucky examined this approach and found it to be too resource intensive, particularly in those areas where background data needed to be collected. We think the draft is wrong in assuming that data transfer from monitored to unmonitored streams is an easily acceptable approach. There would be strong opposition because this is not based on sound science. There are so many unmonitored streams and so few monitored ones in Kentucky that transfer can't be statistically justified.

We are pleased to see that the guidance acknowledges the legitimacy of a designational approach. We have adapted this approach and have included procedures to add waters to the Tier II list as the draft suggests.

Page 4. Is the Proposed Degradation Significant?

The draft appears to advocate a 10% lowering of the assimilative capacity as a threshold for de minimus degradation. It appears to us that this is a state's prerogative. There is nothing in federal law or regulation that establishes this threshold. In Kentucky we are essentially saying that any parameter on a permit (except carcinogens) that utilizes more than 50% of the existing assimilative capacity requires a Tier II review on high quality waters. Tier II protection is provided to a special category of waters as outlined in our regulations. We feel comfortable with this because our use protected waters are more than adequately protected because of the use of the $7Q_{10}$ stream flow as the permit design flow.

We question the draft statement that prevention of cumulative water quality degradation of a waterbody (or even a watershed) with a reserve in the assimilative capacity would fully comply with the provisions of federal policy (we assume this policy is the federal antidegradation policy.) Nothing in that policy prevents all of the assimilative capacity from being utilized in a Tier II water if a state finds that lowering of water quality is necessary to accommodate important economic or social development in the area where the waters are located. It is up to a state to decide if there should be a reserve of assimilative capacity that cannot be utilized.

Page 5. Necessary Lowering of Water Quality

We concur with the draft position that an analysis of pollution control/pollution prevention alternatives needs to occur before allowing a lowering of water quality in a Tier II water. It would be helpful if the draft expanded on the suggestion that different sets of alternatives for domestic and industrial systems may be appropriate and give the rationale for this. Examples would also help.

Page 5. Identification of Important Social or Economic Activities in the Area in Which the Waters are located.

The draft would be more useful if the economic factors listed had decision criteria that

related to importance. Kentucky opted out of listing these factors (we considered the draft examples and others) because we do not have the economic expertise to make these judgements. We have left economic and social importance considerations in our policy statement to be sure they will be addressed in Tier II reviews. This will be done on a case-by-case basis with local involvement, and open to public review. The example language "clearly in the public interest" is not defined and an elaboration should be provided to explain how Florida makes this decision.

Page 6. Other Provisions to be Included in a State's Methodology

Some of the suggested provisions are not appropriate for state regulations because they do not coincide with state statutes for regulation development. An example is number (3) requiring an example of public notice language of a proposed determination referencing the state antidegradation policy. Any future change to this language in Kentucky would have to go through a laborious rule-making process before it could be implemented. We would suggest that these provisions should be flexible to allow for the differences in state rule-making procedures. States can outline these to the Region with specificity without being too specific in state regulations. References to existing procedures are more easily incorporated in regulations.

Other comments:

The guidance should recognize that implementation is a state responsibility and if a state adopts a methodology that does not contradict the federal antidegradation policy at 40 CFR Section 131.12(a)(2) the adoption should be approved. Revisions can be made after states have developed experience and a track record in actually implementing their policy. If the Region is too prescriptive in what it will approve, the chances of changing the state regulations to comply are diminished. This is because the previous time and resources devoted by state agencies and stakeholders in drafting regulations and the political will expended to obtain adoption is difficult to reconstruct.

Those states that have permitting programs that use water quality-based limits derived under critical low flow conditions have protected water quality and already are meeting the objectives of maintaining the chemical, physical and biological integrity of their waters. Advocating more stringent limits on waters based on a parameter by parameter analysis does not necessarily result in cost effective improvements in water quality or maintaining water quality because water quality may be degraded by activities related to nonpoint source pollution, stormwater or atmospheric deposition. Agency resources need to be flexibly applied so that they can be directed at solving real water quality problems by focusing on their causes. The parameter by parameter Tier II approach in the draft (as far as Kentucky is concerned) would use our limited resources in an unproductive manner if we were to adopt it because most water quality problems are not point source related.

Based on our monitoring and assessment programs we have no indication that measurable water quality degradation has resulted from implementing our antidegradation policy in Tier 1

waters. As a result, we do not see the need for a major change in our programs that direct our resources to include a large number of Tier II reviews.

Thank you for the opportunity to comment on the draft. If you have any questions, please contact Terry P. Anderson, Water Quality Branch Manager.

Sincerely,

for Jack A. Wilson, Director
Division of Water

JAW:TPA:dh

c: Mike McGhee, EPA Region IV
Terry P. Anderson, WQ Branch